Topor Contracting, Inc. *and* International Brotherhood of Operating Engineers, Local 17. Case 3–CA–24557

November 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by the Union on November 14, 2003, the General Counsel issued the complaint on May 19, 2005, against Topor Contracting, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On October 25, 2005, the Acting General Counsel filed a Motion for Default Judgment with the Board.[1] On October 27, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was filed by June 2, 2005, all the allegations in the complaint would be considered admitted. Further, the undisputed allegations in the Acting General Counsel's motion disclose that the Region, by letter dated July 1, 2005, notified the Respondent that unless an answer was received by July 8, 2005, a Motion for Default Judgment would be filed.[2]

In the absence of good cause being shown for the failure to file a timely answer, we grant the Acting General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Buffalo, New York, has been engaged in demolition and concrete flat work.

During the 12-month period ending January 2004, the Respondent, in conducting its business operations described above, provided services valued in excess of $50,000 for the City of Buffalo, a government entity within the State of New York which is directly engaged in interstate commerce.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the International Brotherhood of Operating Engineers, Local 17 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Thomas P. Toporczyk held the position of the Respondent's president, and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees performing heavy and highway construction and building site work, as described in Article V, Definition and Jurisdiction within the geographic jurisdiction set forth in Article II, of the April 1, 2002, through March 31, 2005, "heavy and highway" agreement between the Union and the Council of Utility Contractors, Inc.

At all material times, the Council of Utility Contractors, Inc. (COUC), has been an organization composed of employers, one purpose of which is to represent its employer-members in negotiating and administering collec-

[1] The Acting General Counsel had previously filed a Motion for Default Judgment with the Board in this case on July 26, 2005. In an Order dated September 19, 2005, the Board denied that motion on the ground that the Acting General Counsel had failed to prove service of the complaint or the motion on the Respondent. 345 NLRB No. 60. As indicated below, in support of the instant motion, the Acting General Counsel has shown that the complaint and the Motion for Default Judgment were properly served on the Respondent.

[2] On July 1, 2005, the reminder letter and a copy of the complaint were sent by certified and regular mail to the Respondent at the business and home addresses provided to the Board by the Respondent's president and owner Thomas Toporczyk in a sworn affidavit. On the same date, copies of the reminder letter and complaint were also sent by certified and regular mail to the address designated by the Respondent with the State of New York Department of State for service of process. The letters sent by certified mail were returned marked "unclaimed". The letters sent by regular mail have not been returned. It is well settled that a respondent's failure or refusal to accept certified mail or to provide for appropriate service cannot serve to defeat the purposes of the Act. See, e.g., *I.C.E. Electric, Inc.*, 339 NLRB 247 fn. 2 (2003), and cases cited there. In any event, the failure of the Postal Service to return documents sent by regular mail indicates actual receipt. See, e.g., *I.C.E. Electric*, supra.

tive-bargaining agreements with various labor organizations, including the Union.

On or about February 27, 1999, COUC and the Union entered into a "heavy and highway" collective-bargaining agreement, effective from April 1, 1999, through March 31, 2002.

On or about April 1, 2002, COUC and the Union entered into a collective-bargaining agreement effective April 1, 2002, through March 31, 2005.

On or about March 21, 2002, the Respondent signed the April 1, 1999, through March 31, 2002, "heavy and highway" collective-bargaining agreement, which at all material times bound the Respondent to the terms and conditions of employment of that agreement and to future agreements unless timely notice was given.[3]

On or about March 21, 2002, the Respondent, an employer engaged in demolition and concrete flat work, granted recognition to the Union as the exclusive collective-bargaining representative of the unit and since that date the Union has been recognized as the representative by the Respondent without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act. Such recognition has been embodied in successive "heavy and highway" agreements, the most recent of which was effective from April 1, 2002, through March 31, 2005.[4]

Since on or about October 2, 2003, the Respondent has repudiated and failed and refused to adhere to the terms of the collective-bargaining agreement described above.

CONCLUSION OF LAW

By repudiating and failing and refusing to adhere to the terms of the 2002–2005 "heavy and highway" collective-bargaining agreement, the Respondent has been failing and refusing to bargain collectively and in good faith with the limited exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(5) and (1) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing since on or about October 2, 2003, to adhere to the terms of the 2002–2005 "heavy and highway" collective-bargaining agreement with the Union, we shall order the Respondent to make whole the unit employees for any loss of earnings and other benefits they have suffered as a result of the Respondent's failure between October 2, 2003, and March 31, 2005, to continue in effect all the terms of the agreement.[5] Back-

[3] The complaint does not allege that the Respondent has delegated to COUC the authority to bargain on its behalf, or that the Respondent's unit employees have at any time been part of a multiemployer bargaining unit. Accordingly, absent any indication of the requisite consent for multiemployer bargaining, we shall assume that the unit is a single employer unit.

[4] The complaint alleges that the Respondent is a construction industry employer and that it granted recognition to the Union without regard to whether the Union had established majority status. Accordingly, we find that the relationship was entered into pursuant to Sec. 8(f) and that the Union is therefore the limited 9(a) representative of the unit employees for the period covered by the contract. See, e.g., *A.S.B. Cloture, Ltd.* 313 NLRB 1012 (1994).

[5] The Respondent entered into the collective-bargaining agreement with the Union on March 21, 2002, pursuant to Sec. 8(f) of the Act. At that time, the agreement was effective through March 31, 2002. The complaint further alleges that, by signing the agreement, the Respondent agreed to be bound to future agreements unless timely notice was given. The complaint also alleges that the Respondent unlawfully failed to honor one such future agreement, which was effective April 1, 2002, through March 31, 2005. On these alleged facts, which have been effectively admitted by the Respondent, we find that the remedy in this case runs until March 31, 2005. *John Deklewa & Sons*, 282 NLRB 1375 (1987). See also, *James Luterbach Construction Co.*, 315 NLRB 976 (1994).

Our dissenting colleague would extend the remedy beyond March 31, 2005. We disagree. The complaint here alleges that the contract was effective until March 31, 2002, and that the Respondent agreed to be bound to future agreements if no timely notice of cancellation was sent. However, the complaint alleges only one such future agreement. The complaint is therefore subject to the reasonable reading that the Respondent became bound to only one future agreement.

Our finding in this regard, however, does not preclude the Acting General Counsel from amending the complaint to allege that the Respondent became bound to additional agreements. In the event that the Respondent again fails to file an answer, thereby admitting evidence that would permit the Board to extend the remedy beyond March 31, 2005, the Acting General Counsel may renew the Motion for Default Judgment with respect to the amended complaint.

Member Liebman dissents from her colleagues' failure to provide for a remedy beyond March 31, 2005. Where, as here, a respondent has repudiated an 8(f) contract, the respondent should be ordered "to honor that contract *and any automatic renewal or extension of it*." *McKenzie Engineering Co.*, 326 NLRB 473 fn. 3, 474 (1998) (emphasis added), enfd. 182 F.3d 622 (8th Cir. 1999). As the Board explained in *McKenzie Engineering*, such a remedial order appropriately "grant[s] the extent of recognition that is owed to a collective-bargaining representative in an 8(f) relationship." Id. at fn. 3 (citing *John Deklewa & Sons*, 282 NLRB 1375, 1387 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988)). Accord: *South Alabama Plumbing*, 333 NLRB 16, 17 fn. 2 (2001) ("We amend the judge's remedy to provide that the Respondent is liable for honoring the July 15, 1996–July 14, 1998 collective-bargaining agreement for its term, *as well as any automatic renewal or extension of the contract*.") (emphasis added); *Energy Services International*, 343 NLRB No. 6, slip op. at 3–4 (2004) (the Board ordered the respondent "to honor the terms and conditions of the Inside Agreement, *and any automatic renewal or extension of it*.") (emphasis added). Ordering the Respondent to honor any automatic renewal or extension

pay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, we shall order the Respondent to make all contractually required contributions to fringe benefit funds that it failed to make, including any additional amounts due the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Further, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.[6]

ORDER

The National Labor Relations Board orders that the Respondent, Topor Contracting, Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to adhere to the terms and conditions of the 2002–2005 "heavy and highway" collective-bargaining agreement with the International Brotherhood of Operating Engineers, Local 17, covering the employees in the following unit:

> All employees performing heavy and highway construction and building site work, as described in Article V, Definition and Jurisdiction within the geographic jurisdiction set forth in Article II, of the April 1, 2002, through March 31, 2005, "heavy and highway" agreement between the Union and the Council of Utility Contractors, Inc.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of its unlawful refusal to adhere to the collective-bargaining agreement between October 2, 2003, and March 31, 2005, and reimburse them for any expenses ensuing from its failure to make contractually-required contributions to fringe benefit funds, with interest, as set forth in the remedy section of this decision.

(b) Make all contractually-required contributions to fringe benefit funds that it has failed to make between October 2, 2003, and March 31, 2005, as set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Buffalo, New York, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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of the 2002–2005 agreement is particularly appropriate in this case because the Respondent has effectively admitted the complaint allegation that, pursuant to the terms of the 1999–2002 contract, it was bound "to future agreements unless timely notice was given." Any dispute over whether such notice was given may be resolved at the compliance stage of this proceeding. *South Alabama Plumbing*, supra.

[6] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. November 30, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to adhere to the terms and conditions of the 2002–2005 "heavy and highway" collective-bargaining agreement with the International Brotherhood of Operating Engineers, Local 17, covering the employees in the following unit:

> All employees performing heavy and highway construction and building site work, as described in Article V, Definition and Jurisdiction within the geographic jurisdiction set forth in Article II, of the April 1, 2002, through March 31, 2005, "heavy and highway" agreement between the Union and the Council of Utility Contractors, Inc.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole our unit employees for any loss of earnings and other benefits they have suffered as a result of our unlawful refusal to adhere to the collective-bargaining agreement between October 2, 2003, and March 31, 2005, and reimburse them for any expenses ensuing from our failure to make contractually-required contributions to fringe benefit funds, with interest.

WE WILL make all contractually-required contributions to the fringe benefit funds that we have failed to make between October 2, 2003, and March 31, 2005, with interest.

TOPOR CONTRACTING, INC.